BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WINNIE GENEVA ADAMS	)	
Claimant	)	
	)	
VS.	)	
	)	
MORRIS COUNTY HOSPITAL	)	
Respondent	)	Docket No. 1,017,747
	)	
AND	)	
	)	
KANSAS HOSPITAL ASSOCIATION	)	
WORKERS COMPENSATION FUND, INC .	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the June 20, 2007 Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on October 2, 2007.

APPEARANCES

Roger D. Fincher, of Topeka, Kansas, appeared for the claimant. Wade A. Dorothy, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, claimant conceded that she is no longer pursuing a claim for a fall occurring on October 13, 2003 (as that claim was not filed in a timely manner). The only claim presently being asserted in this matter is a claim for a series of accidents beginning October 13, 2003 and culminating in an accident on May 20, 2004, her last day of work.

ISSUES

The Administrative Law Judge (ALJ) found that the preponderance of the evidence indicates that the claimant tore the ACL in her left knee in the October 13, 2003 fall, and then aggravated it through a series of traumas up to the last day of work, May 20, 2004. The ALJ also found that although claimant failed to provide notice of her series of injuries

within 10 days of her last day worked, there was just cause for her delay, and therefore her notice was considered timely as to a series of accidents.

The ALJ awarded the claimant a 15 percent permanent partial impairment to the left lower extremity only, as he concluded that claimant failed to establish that she suffered injury to any other body part.[1] He ordered the respondent to pay medical mileage, out of pocket copayments and the unpaid balances from various medical providers as itemized in Exhibit 2 to the Regular Hearing transcript. Finally, the ALJ concluded the claimant was not entitled to temporary total disability benefits for the period May 21, 2004 to November 22, 2004 based upon his interpretation of K.S.A 44-510d(b).

The claimant requests review of the Award alleging the ALJ erred on several issues. Claimant first contends that she sustained not only permanent impairment to her left knee but to her neck, right shoulder, right elbow, right knee and to her right toe, which was rated by Dr. Lynn Curtis at 28 percent to the whole body. And because her injury was to a unscheduled body member, claimant maintains she is entitled to a permanent partial general (work) disability under K.S.A. 44-510e(a) between 42 and 54.5 percent.[2] She further contends that whether her impairment is limited to a left knee or extends to her whole body, she is nonetheless entitled to temporary total disability benefits for the requested period.

Respondent argues that there is no credible evidence to support that the claimant sustained any aggravating injury while working for respondent between October 13, 2003 and May 20, 2004. Moreover, respondent contends that while claimant filled out an accident report on June 11, 2004, that report only references an accident on October 13, 2003, not a series of accidents culminating on May 20, 2004. Independent of these arguments, respondent maintains that the ALJ correctly assessed claimant's permanent impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was employed as an LPN and on October 13, 2003 she fell, suffering an injury. Claimant's explanation of her fall has remained largely consistent but the body parts involved in the fall have varied over the course of this claim. There is no dispute that claimant fell and injured her left knee. Whether she also injured her neck, right shoulder

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[1] ALJ Award (June 20, 2007) at 5.

[2] These work disability figures are based upon a 58 task loss and a range of 26 to 51 percent wage loss.

and elbow, right knee and her right (big) toe *and continued to aggravate some or all of those body parts* are at the heart of the parties' dispute. In addition, claimant's notice to respondent of her series of injuries is at issue as well.

Claimant testified that she worked the remainder of her shift that day and continued to work her regular duties until May 20, 2004. She testified that she sought treatment from a chiropractor but those records are not contained within the record. No accident report was filled out at the time of the October 13, 2003 fall and claimant apparently missed no work due to the accident. However, over the course of the next months claimant testified that she complained to various supervisors that she was experiencing problems with her back and that the 12 hour shifts were difficult. Although at least one of respondent's employee's agrees that claimant complained about the 12 hour shifts, none of those witnesses acknowledge that claimant complained of her back hurting due to a work-related injury, nor did they observe her limping.

On May 21, 2004, claimant woke up and noticed her left knee was swollen. This had periodically happened since the birth of her last child, but on this date claimant decided she might have a blood clot. She consulted with her private physician, Dr. Joel Hornung. According to Dr. Hornung, claimant did not tell him about a fall in October 2003, nor did she describe a slowly worsening condition since that time. In fact, all of her complaints related solely to her left knee. Dr. Hornung referred her to the hospital where she was treated for a presumptive blood clot. That condition was eventually ruled out and claimant was then referred to an orthopaedic physician and on June 2, 2004, she saw Dr. James McAtee.

When claimant first saw Dr. McAtee she told him that on October 13, 2003 she fell landing on *both* knees. But according to Dr. McAtee, her complaints were limited to her left knee. He recommended an MRI which was done on June 3, 2004. Shortly thereafter, claimant began to suspect that her knee problems were related to her October 2003 fall. Dr. McAtee thereafter diagnosed an "old" ACL injury which was surgically repaired on June 14, 2004. After surgery, claimant voiced some complaints about her neck and back, but these were attributed to using crutches and they apparently subsided.

When asked to opine on how "old" the tear was, Dr. McAtee testified that the condition of the tear was such that it was at least older than 2-4 months. Dr. McAtee went on to testify that as of September 2004, claimant began to relate her knee problem to the October 13, 2003 fall. However, he indicated that he could not relate this torn ACL to an event on October 13, 2003. In fact, he testified that the mechanism claimant describes is not consistent with this sort of injury. Rather, a torn ACL is usually caused by twisting or pivoting, a maneuver that claimant did not describe.[3] He did say that claimant could have continued to do her job even after the ACL was torn, but there is no information upon which he could find there was any permanent worsening of that condition (assuming it existed

[3] McAtee Depo. at 14.

before October 13, 2003 or occurred on that day) in the months before she last worked for respondent in May 2004.

Dr. McAtee released claimant on January 12, 2005. He rated her at 5 percent permanent partial impairment to the knee, explaining that the 5 percent is related to the fall and the continued activities after the fall.[4] It is worth noting that this opinion is totally inconsistent with his earlier opinions.

In the meantime, claimant was terminated from respondent's employ. She worked at a convenience store in Council Grove, Kansas from November 21, 2004 to November 1, 2005, about 18-20 hours a week and also does some house cleaning and home health care. According to claimant, she has earned $150 to 300 per week since her termination in September 2004. From January 2006 to February 2007 she looked at a maximum of 25 places for employment.

After surgery, claimant was examined by Dr. Peter Bieri at the request of her then-attorney. During the course of this examination, claimant did not describe any ongoing aggravations or worsening following the initial October 13, 2003 accident. She complained only of pain in both knees and told Dr. Bieri she fell on both knees. Dr. Bieri assessed claimant's impairment at 15 percent to the left knee and 5 percent to the right. When asked, he testified that claimant "could have" aggravated her condition by working after the fall, assuming she worked without restrictions.[5] But he also testified that claimant did not describe a worsening over time and that there is no way to know if the tear worsened in the months after the fall.[6]

Claimant continued to have left knee problems and on her own, she sought treatment with Dr. Kenneth Jansson in July 2005. Again, she voiced complaints solely to her left knee and according to Dr. Jansson, she exhibited classic ACL complaints along with an unstable left knee. The right knee looked "normal". He diagnosed a torn ACL and recommended surgical reconstruction, a procedure that was done on August 5, 2005.

When deposed, Dr. Jansson testified that claimant "could have" torn her ACL on October 13, 2003, followed by some swelling and then return to her normal duties. In fact, he gave a rather lengthy description of how torn ACL's are sometimes missed.

> Commonly people tear their ACLs, go through a short period of swelling, pain, and then return to almost normal activity. In fact, prior to the introduction of MRI scans, we used to miss a lot of ACL tears for just that reason. And the problem is, is that the other structures in your knee are relatively stable, and over time they're not

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[4] *Id.* at 33.

[5] Bieri Depo. at 15.

[6] *Id.* at 15-16.

> designed to do the job of the ACL, so over time they tend to stretch out and your knee gets gradually looser and looser and looser. So very frequently we see people who have a knee injury, you know, some kid will blow his knee out playing football, he'll go to the doctor. Back in the days we didn't have an MRI, they'd say he had a knee strain. They'd treat you with some anti-inflammatories. Your knee would get better, because the swelling goes down. The ACL is torn in half. It's -- you know, that's not going to hurt any more. And if they don't have any other problems with the knee, the swelling goes down, their motion comes back, they're comfortable, they go back and do stuff. Now, over time, their knee will loosen up, the other structures around the knee will loosen up and the knee will get more and more unstable. Frequently that degree of instability will result in a torn meniscus, their knee will hurt, then they come to the doctor, and now they have a grossly unstable knee, and that's when we first pick up that they have a torn ACL.
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> Now, today, you know, I emphasize with the doctors I teach, if somebody gets a pop and snap and immediate swelling in their knee, that's an ACL until proven otherwise, and you need to get an MRI right away. And we'll see a lot of people that the MRI will show their ACL is torn even if their knee is not that symptomatic, but that's the best time to fix the knee, because if you fix it right then and there, you preserve all those secondary stabilizers, they help protect your graft while the graft heals, the graft keeps them from stretching out, and you get a synergistic value to that. Plus they don't tear their meniscus and get associated. So what you're asking is correct. Over time, you know, an unstable knee will wear out faster, will get arthritis faster, will tear your meniscus up, will become more symptomatic over time. That's why we fix them. But it's common -- you know, when I was down in Dallas, you know, it was kind of a poorly kept secret that Emmitt Smith blew out his ACL in a game, didn't want to get it fixed and he played his last couple of years with his ACL out. So, you know, people can play or do things for awhile before it gets so bad that they might not. So that's not uncommon to have that history.[7]

Claimant was also examined, again at the request of her present lawyer, by Dr. Lynn Curtis. This examination occurred on April 20, 2006. Dr. Curtis noted pain in the neck, right shoulder, a stretch injury in the right elbow, wrist pain, bilateral knee injuries and an injury to the right big toe, all following the October 13, 2003 fall. Dr. Curtis indicated that claimant's problems all began after the fall and got worse, particularly those that were never addressed.[8] He testified that claimant was not then at maximum medical improvement, but because the claim had been denied by respondent and denied by the ALJ[9] he went ahead and rated her conditions at 28 percent to the body as a whole. He also suggested that claimant had suffered a loss of 15 out of a total of 26 tasks as a result. His testimony makes it clear that this impairment is attributable to both the October 13,

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[7] Jansson Depo. at 17-19.

[8] Curtis Depo. at 7.

[9] Earlier in the litigation of this claim, the ALJ preliminarily concluded that claimant had failed to establish that the left knee pain was caused by or aggravated by her employment.

2003 fall and the following aggravations.[10] Unfortunately, there is no indication within his testimony that suggests how much of this impairment is attributable to the alleged aggravations as opposed to the initial fall.

The ALJ considered the evidence and concluded that claimant's recitation of the mechanism of the accident "appear[ed] to represent the twisting action that the physicians indicated was a more likely cause of a torn ACL."[11] And he further noted that "Drs. Hornung, Jansson, Curtis and Bieri all indicated that is was possible the claimant's working post-accident had further aggravated her condition."[12] He went on to find that "the evidence establishes the claimant tore her ACL in the October 2003 fall, and then aggravated this condition in a series of microtraumas as she continued to work 12 hour shifts."[13] And because she alleged a series of microtraumas which culminated in an accident on her last day of work, May 20, 2004, her filing of an application for hearing on June 11, 2004 constituted timely notice as he found "just cause" for her delay in notifying respondent beyond the normal 10 day period. He then went on to grant claimant a 15 percent impairment apparently based on Dr. Bieri's opinions and declined to award any further impairment as he concluded claimant failed to establish any permanency to any other part of her body.

The ALJ also refused to award temporary total disability (ttd) benefits based upon a statutory argument that according to him, excluded ttd benefits when only scheduled injuries were involved. And he ordered most, but not all, of the medical bills along with mileage to be paid.

The threshold issue to resolve in this matter is whether claimant established that it is more likely true than not that she sustained a series of injuries culminating in an accident on May 20, 2004.[14] If not, then claimant cannot recover as claimant has conceded that a claim for the acute accident that occurred on October 13, 2003 was not filed in a timely manner. But if she has established a series of microtraumas, then the Board must consider whether she gave notice in a timely fashion as required by K.S.A. 44-520.

After considering the evidence, the majority of the Board finds that claimant has, by the barest of margins, established that she sustained a series of microtraumas. This

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[10] Curtis Depo. at 24-25.

[11] ALJ Award (June 20, 2007) at 4.

[12] *Id.* at 5.

[13] *Id.*

[14] Neither party disputes that at all relevant periods of time to the date of accident in cases involving a series of microtraumas is generally determined to be the last date worked. See generally *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994); *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

conclusion is based on the testimony of the physicians. Although they do not all agree, it appears more likely than not that claimant sustained a torn ACL in the October 13, 2003 accident and then as she continued to work for respondent at her job as an LPN, working without any restrictions, the job duties took their toll on her knee. And on May 21, 2004, when she awoke to a swollen knee, the condition manifested itself to such a degree that claimant could no longer ignore the symptoms. Thus, the ALJ's conclusion on this issue is affirmed.

The first time claimant expressly advised respondent of an accidental injury occurred on June 11, 2004, when respondent and claimant filled out an accident report. This notice was more than the 10 day period set forth in the statute.[15] But that accident report references only the October 13, 2003 accident and says nothing about a series of microtraumas. When the Application for Hearing was filed on July 6, 2004, it contained a reference to a series of injuries occurring up to the last date worked.

K.S.A. 44-520 provides that notice may be extended to 75 days from the date of accident if claimant's failure to notify respondent under the statute was due to just cause. In considering whether just cause exists, the Board has listed several factors which must be considered:

> (1) The nature of the accident, including whether the accident occurred as a single, traumatic event or developed gradually.
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> (2) Whether the employee is aware he or she has sustained an accident or an injury on the job.
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> (3) The nature and history of claimant's symptoms.
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> (4) Whether the employee is aware or should be aware of the requirements of reporting a work-related accident and whether the respondent had posted notice as required by K.A.R. 51-13-1.

Under these facts, both respondent and claimant were aware of an acute accident on October 13, 2003. And she testified that she complained about her problems sporadically although respondent's employees deny such complaints as they related to a work-related accident. Rather, claimant was believed to be complaining about the 12 hour shifts. What claimant apparently failed to grasp was the fact that because she continued to suffer from the effects of her injury, that those symptoms might, under law, constitute another accident. The fact that claimant did not understand that possibility is evidenced by the fact that each time claimant went to see a doctor, she would nearly always reference the October 13, 2003 accident, at least at some point during her care. The elusive nature

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[15] K.S.A. 44-520.

of this sort of injury is confirmed by Dr. Jannson's explanation regarding ACL tears and how they are sometimes difficult to diagnose, absent an MRI, a diagnostic tool that was not used on claimant until June 2004. Based upon this, the Board affirms the ALJ's conclusion that there was just cause for claimant's delay in providing respondent with notice of a series of microtraumas.

Turning now to the nature and extent of claimant's impairment, the Board, like the ALJ, remains unpersuaded that claimant sustained anything but a permanent partial impairment to her left knee. Claimant consistently asserted her left knee complaints to the physicians but the other complaints encompassed by Dr. Curtis' report came out long after her accident, even after she ceased working for respondent. And while claimant did complain of neck and back pain to Dr. McAtee's nurse, these complaints were attributed to the use of crutches and were not consistently asserted during the balance of her office visits with that physician. The Board finds that it is more probably true than not that claimant's impairment is limited to her left knee.

The ALJ awarded claimant 15 percent permanent partial impairment to the left knee. After considering the entire record, particularly the physicians' opinions as to claimant's impairment, the Board finds this figure should be modified to 5 percent, consistent with the opinions expressed by Dr. McAtee, the treating physician.

The Board also finds that claimant is not entitled to ttd benefits, albeit for a different reason than that provided by the ALJ. The Board has, in the past, taken the position that ttd benefits are payable on claims involving only functional impairments and scheduled injuries and does the same here. Specifically the Board finds that the ALJ's legal argument is unpersuasive.

The temporary total disability statute, K.S.A. 44-510c, does not specifically address the issue now before us. But that statute does state that permanent disability benefits under K.S.A. 44-510d may be paid following a period of temporary total disability.

> (c) When any permanent total disability or temporary total disability is followed by partial disability, compensation shall be paid as provided in K.S.A. 44-510d and 44-510e and amendments thereto.[16]

K.S.A. 44-510d reads, in part:

> (a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be

[16] K.S.A. 44-510c.

> paid for temporary total loss of use and as provided in the following schedule, 66⅔% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:
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> (21) Permanent loss of the use of a finger, thumb, hand, shoulder, arm, forearm, toe, foot, leg or lower leg or the permanent loss of the sight of an eye or the hearing of an ear, shall be equivalent to the loss thereof. For the permanent partial loss of the use of a finger, thumb, hand, shoulder, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, compensation shall be paid as provided for in K.S.A. 44-510c and amendments thereto, per week during that proportion of the number of weeks in the foregoing schedule provided for the loss of such finger, thumb, hand, shoulder, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, which partial loss thereof bears to the total loss of a finger, thumb, hand, shoulder, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear; but in no event shall the compensation payable hereunder for such partial loss exceed the compensation payable under the schedule for the total loss of such finger, thumb, hand, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, exclusive of the healing period. As used in this paragraph (21), "shoulder" means the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures.
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> (b) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

On its face, K.S.A. 44-510d(a) indicates temporary total disability benefits may be paid relative to a scheduled injury.

In addition, Kansas Administrative Regulations (K.A.R.) 51-7-8 sets forth how temporary total disability benefits are to be deducted when determining an award of permanent disability benefits for a scheduled injury.

It is acknowledged the language of K.S.A. 44-510d(b) appears to indicate temporary total disability compensation is not appropriate when a worker sustains a scheduled injury. But similar language taken from chapter 232, Laws of [Kansas] 1927, has been interpreted by the Kansas Supreme Court as not restricting the entitlement to temporary total disability benefits but, instead, prohibiting a pyramiding of benefits. The Kansas Supreme Court has held:

> While the language of our statute might have been better framed, its purpose, in our opinion, was solely to prevent the "pyramiding of compensation" – such as an award for both hand and finger when the only injury to the hand was the injury to the finger.[17]

Citing *Thompson*[18], the Kansas Supreme Court added:

> "This provision is not applicable to the facts in this case and was enacted to overcome a defect in the old statute allowing double compensation for the same disability, or what has been termed as a pyramiding of compensation. It was held that when compensation was allowed for the loss of a finger, a part of the hand, no compensation could be allowed for the hand which was not otherwise injured. The *language used*, that the allowance was exclusive of all other compensation, *means that it is exclusive for the specific injury*. That is, that the specific loss of the finger was exclusive of other compensation for that specific loss. For instance, it means that compensation is not allowable for the loss of a leg and also of a foot which was a part of the leg, nor could there be an allowance for the loss of a hand and also the fingers on it. Nor can the loss of a finger for which payment has been made under the schedule be added to the compensation for temporary or permanent disability *for the particular injury of the finger*."[19]

Considering the above, the Board concludes an injured worker who sustains a scheduled injury under K.S.A. 44-510d is not precluded from being awarded temporary total disability benefits.

Nonetheless, there is no indication in this record from the treating physician as to whether claimant should be off work from May 21, 2004 to November 11, 2004. Without some indication from the treater as to what period, if any, claimant was unable to work, it is impossible to award ttd benefits. Thus, this finding in the Award is affirmed.

Finally, claimant is awarded the additional medical bills that were apparently omitted from the Award, including those remaining unpaid bills from the Kansas Surgery and Recovery Center, subject to the statutory fee schedule.

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[17] *Chamberlain v. Bowersock Mills & Power Co.*, 150 Kan. 934, 944, 96 P.2d 684 (1939).

[18] *Thompson v. General Machine & Tool Co.,* 135 Kan. 705, 11 P.2d 685 (1932).

[19] *Chamberlain*, 150 Kan. 934, at 942.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated June 20, 2007, is modified as follows:

The claimant is entitled to 10.00 weeks of permanent partial disability compensation, at the rate of $314.95 per week, in the amount of $3,149.50 for a 5 percent loss of use of the leg, making a total award of $3,149.50.

Claimant is also entitled to payment of the additional medical bills that were apparently omitted from the Award, including those remaining unpaid bills from the Kansas Surgery and Recovery Center, subject to the statutory fee schedule.

Dated this _____ day of October, 2007.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Wade A. Dorothy, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge